BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

THE OPINION OF THE COURT OF APPEALS. In this case the petitioner, Clarence H. Rayno, seeks to have reviewed the judgment of the Court of Appeals for the First Circuit vacating the judgment of the District Court and setting aside the verdict in his favor. The case was remanded to the District Court for further proceedings consistent with the opinion of the Court of Appeals. See, Opinion, Record, 233, 241.

JURISDICTIONAL STATEMENT. This petition for certiorari is based on 28 Judicial Code, Sect. 347 (a) which provides, —

> "In any case, civil or criminal, in the Circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto * * * to require by certificate either before or after the judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if it had been brought there by unrestricted appeal."

The judgment of the Court of Appeals vacating the judgment of the District Court and setting aside the verdict was entered on June 14, 1943. The petitioner's motion for rehearing was denied on July 6, 1943. (R. 242).

STATEMENT OF THE CASE. This petition for condemnation was filed and the War Department authorized to take possession of Rayno's land on September 28, 1939. The essential allegations were admitted and the only issue is the just compensation for the taking of petitioner's land. The petition is based upon 33 U. S. Code, Sect. 591, which authorizes the acquisition by condemnation of "any land, rights of way or material needed * * * to maintain, operate and prosecute works for the improvement of rivers and harbors for which provision has been made by law. (R. 2). The land was condemned to acquire material needed for the construction of a flood control dam and reservoir on the Pemigewasset River. The damages were assessed by jury which awarded

$12,725 and judgment was entered on the verdict from which the United States appealed. (R. 16, 19, 228).

The War Department in August 1939 commenced the construction of this flood control project pursuant to the provisions of the Flood Control Act approved June 22, 1936, (49 Stat. 1570), and the amendment thereto approved June 28, 1938. (52 Stat. 1215). Following the enactment of the Flood Control Act in 1936, the War Department commenced a geological reconnaissance of the land within a radius of five miles of the site of this flood control project to locate material suitable for the core and blankets of an earth dam. This reconnaissance was continued into the summer of 1938 when tests by drilling to determine the depth and quality of the Rayno and other deposits were completed. (R. 77, 78, 79, 80). Of the three deposits located that on the Rayno land was found to have "the most suitable" material within the area. (R. 78, 79). On May 27, 1938, the Secretary of War transmitted to Congress a report of the chief engineer setting forth a plan for flood control in various sections, including a comprehensive plan for the Merrimack River Valley. See, House Document No. 689. The amendment of June 23, 1938 among other things approved and authorized as to the Merrimack River Basin the "general comprehensive plan for flood control and other purposes as approved by the Chief of Engineers pursuant to preliminary examinations and surveys authorized by the act of June 22, 1936". (52 Stat. 1215). This "general comprehensive" plan as set forth in the report of the Chief Engineer provided for a flood control project at Franklin Falls consisting of an earth dam with a pool area of two thousand nine hundred fifty acres. The description of the project did not include Rayno's land, which is about three and one-half miles from the site of the dam. However, the specifications for the dam released in the summer of 1939 disclosed that the "borrow" or material for the core and blankets was to be taken from "borrow area A", the Rayno land. (R. 71-2). When the construction of the dam was commenced in August 1939, the general public, through the geological reconnaissance and the specifications, had learned that the Rayno land contained material suitable for the construction of the dam.

This material, a glacial till, had a density comparable to and only a little less pervious than cement concrete. (R. 77).

A combination of clay and coarser matter, the glacial till "when properly compacted produced a core quite impervious to water" and with sufficient strength to prevent shearing. (R. 192, 203). It had been used to construct tennis courts and for surfacing clay chloride roads, but no considerable demand therefor existed prior to the construction of the dam. (R. 97, 157-9, 174). The uncontradicted evidence disclosed that borrow is usually sold by the cubic yard at the deposit or borrow pit and removed by the purchaser at his own expense. (R. 99, 105, 122, 142). The prevailing price for borrow, both in the vicinity of the dam and generally throughout the state, is from two to ten cents per cubic yard according to quality. (R. 105, 123, 141, 171, 202). Selected borrow such as the Rayno deposit is commonly sold at from five to ten cents per cubic yard. For instance, in 1942 the United States sold from the National Forest Reservation in Franconia fifty thousand cubic yards of common borrow at two cents per cubic yard and seventy thousand cubic yards of gravel borrow at five cents per cubic yard under conditions similar to those in the present case. (R. 122, 132-3). There is direct evidence that the market value of the plaintiff's land at the time of taking was from ten to thirteen thousand dollars. (R. 114, 123, 142). In addition there was some indirect damage to the plaintiff's farm occasioned by the taking. (R. 51, 210, 217).

The jury was instructed that for the land taken the petitioner "is entitled to fair and just compensation * * * not exceeding fair market value." (R. 223). Market value was defined as the price or value on which a willing seller and a willing purchaser, each knowing all the factors affecting value, would have agreed. (R. 223). The jury was also told that just compensation must be determined by the "loss to Rayno and not the gain to the Government". (R. 225). The Government requested instructions "that the landowner was not entitled to recover any element of value arising from the prospect that the land would be taken by the Government" and "that the presence of the glacial till could not be considered unless there was a demand for the material by someone other than the Government." (R. 226). Failure to give these requests was held to constitute error, for which the judgment was vacated and the verdict set aside. (R. 241). In reaching this result the Court of Appeals held that petitioner's land

"was within the scope of the project from the time the Government was committed to it". (R. 238).

SPECIFICATIONS OF ERRORS. The petitioner maintains that the Court of Appeals erred, —

1. In holding that the condemnor may not be considered as a potential purchaser in determining the market value of the petitioner's land at the time of taking.

2. In holding that the demand for borrow material for the construction of the project may not be considered in determining the value of petitioner's land.

3. In holding that petitioner's land was "within the scope of the project from the time the Government was committed to it".

ARGUMENT.

The broad question is whether the petitioner is entitled as damages to the fair market value of the "borrow" on his land. There is no conflict in the evidence as to the market value of such material. The law as declared by the Court of Appeals would preclude the petitioner from recovering the market value of this borrow unless there were other customers ready and willing to purchase this identical material. The question is of considerable public interest as borrow pits and deposits are to be found throughout the United States. If the rule adopted in this case is followed, governmental agencies in most cases will be able by eminent domain to acquire such material not at its fair market value but at the value of the land for agricultural or other uses for which it is less valuable.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE CONDEMNOR MAY NOT BE CONSIDERED AS A POTENTIAL PURCHASER IN DETERMINING THE MARKET VALUE OF THE PETITIONER'S LAND AT THE TIME OF TAKING. The Court of Appeals held that the jury ought to have been instructed in effect "that the landowner was not entitled to recover any element of value arising from the prospect that the land would be taken by the Government" and "that the presence of the glacial till could not be considered unless there was a demand for the material by someone other than the Government". (R. 241). These requests would preclude any consideration of the Government

as a potential purchaser of the land. The statute which authorizes the condemnation "of any land, right of way or material needed * * * to maintain, operate or prosecute works for the improvement of rivers and harbors" also authorizes the Secretary of War to purchase any "such land, right of way or material" when obtainable at a reasonable price. (33 U. S. Code, sect. 591). The petitioner's land contained borrow most suitable for the construction of the core and blankets of the dam. In negotiating for the land a prudent man in the position of the War Department would take into consideration the special adaptability of this material for this use. He would also take into consideration the prevailing prices for such material. A fair or reasonable price would be based upon these and other factors affecting the value of the land. The question here presented has not been directly decided, but the authorities indicate the true rule. In *Olson v. United States*, 292 U. S. 255, this Court said, — "To the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account." But it has been suggested that this rule does not apply to cases in which the condemnor is the only prospective purchaser of the land and such is the holding in the present case. In *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, the condemnor was apparently the only purchaser, but the possibility that other persons might desire the lands for the same special use was reflected in the holding that the "adaptability of the lands for the purpose of a boom was therefore a proper element for consideration in estimating the value of the lands condemned."

However, in *New York v. Sage*, 239 U. S. 57, a case arising under the due process clause, this Court held that the condemnor might be considered as a potential purchaser in determining market value. This Court said, —

> "No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain."

Since this case arose under the laws of New York it is not controlling, but it does state what would seem to be the true rule. This rule in allowing consideration of the price which the condemnor would have paid, if the land had been offered for sale, places the parties upon equal footing. The condemnor is thus precluded from acquiring the property for less than he would have paid at a fairly conducted sale. This rule is but a corollary of the usual tests for determining market value. "In respect of each item of property that (market) value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson v. United States*, 292 U. S. 246, 257. The authorities however, are in no agreement as to whether the condemnor may be considered as a purchaser. See, Value to the Taker, 31 Col. Law Rev. 1. This question has assumed a new importance because of the large number of condemnation cases now pending throughout the United States.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DEMAND FOR BORROW MATERIAL FOR THE CONSTRUCTION OF THE PROJECT MAY NOT BE CONSIDERED IN DETERMINING THE VALUE OF PETITIONER'S LAND. The construction of the dam created a demand for cement, steel, and various materials, including borrow. This demand was naturally reflected in the market for such materials. The demand would be felt to a greater or less degree according to the breadth of the market and the available supplies. However, the Court of Appeals held "that the presence of glacial till could not be considered unless there was demand for the material by someone other than the Government". (R. 241). This ruling accords to the Government the privilege of acquiring borrow for less than its market value. It denies to the owner the value of his land for the most advantageous use. The demand for borrow results largely from public improvements, but this has not been thought to prevent the owner from demanding the fair value of the borrow. The highway in Franconia is typical of such projects. Approximately fifty thousand cubic yards of sand and seventy thousand cubic yards of gravel were required for the construction of this project. This borrow was taken from the National Forest Reservation and the contrac-

tor paid the United States for sand two cents per cubic yard and for the gravel five cents per cubic yard, or a total of four thousand five hundred dollars. (R. 121-2; 132-5). There was no demand for this borrow until the project was authorized. As stated by the witness Page, "The market is created by (our) going in. We created the market." (R. 124). In the construction of this flood control project, the War Department might have stipulated that the contractor should provide the borrow and if this had been done the contractor and the petitioner would have negotiated with reference to the prevailing prices for such material. The result of their negotiations as indicated by the evidence as to prices paid for borrow would have been a price not much different from the damages awarded by the jury.

The United States, however, under the ruling in this case, unless other demand for the borrow is shown, will acquire this valuable material not at its fair market value but the value of the land for agricultural uses. The demand for borrow resulting from the project was a prime factor in determining market value. Market value at the time of taking is the ultimate standard for assessing damages. In *Olson v. United States*, 292 U. S. 255, the law is declared as follows:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. * * * Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York v. Sage*, 239 U. S. 57, 60 L. ed. 143, 146, 36 S. Ct. 25."

But the ruling in this present case, precludes a consideration of the value of the land for its "highest and most profitable use" because the demand for the material for this use was created by the condemnor. Inasmuch as the demand for borrow largely results from public improvements, this rule, if generally applied, would largely impair the value of gravel pits or deposits. Only in the exceptional case where the demand by others than the condemnor exceeded the supply would the land owner be entitled to recover the fair market value of his borrow.

In other cases, the fact that the condemnor created the demand has not been held to preclude consideration of the value of the property for the specific use. In *Ford Hydro-Electric Co. v. Neely*, 13 F. (2d) 361, land belonging to the defendant was condemned for water power purposes. There was no evidence of any demand for the lands for power purposes except as created by the condemnor, but evidence as to the value of the lands for such purposes was held admissible. The Court said, —

> "The evidence objected to threw light upon the availability of the land for water power purposes and the value of such element, as bearing upon what might be paid for it by one desiring to purchase it, and thus bore upon its market value. By objecting to this evidence, plaintiff in error sought to exclude it altogether. As remarked by the trial judge, the objection went rather to the weight to be given the evidence than to its competency. The availability of the land for the development of water power, and the value of it for such purposes, was a proper element to be considered by the jury in fixing its market value."

The availability of Rayno's land for the core and blankets of the dam and its value for such uses were proper elements to be considered in determining market value. The requested instructions would preclude any consideration of the availability of this material for the construction of the core and blankets unless there was "a demand on the part of someone other than the government". (R. 226, 241). In holding that these instructions ought to have been given, the Court of Appeals has in effect denied Rayno the fair market value of his

land. The present case is no exception to the general rule that the landowner is entitled to the fair market value of its property at the time of taking. Property would have no market value without some demand. Market value is the result of demand operating upon supply. To distinguish between governmental and private demand, as is done in the present case, is to discriminate in favor of the government, both against the landowner and other users of borrow. The owner of a borrow pit or deposit ought to be entitled to its fair market value whether the demand comes from a governmental agency or some private entity. The present holding would deny to Rayno the fair market value of his land at the time of taking.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S LAND WAS "WITHIN THE SCOPE OF THE PROJECT FROM THE TIME THE GOVERNMENT WAS COMMITTED TO IT". The Court of Appeals held "that Rayno's land, although not contiguous to the land flooded or the land used for the dam site, was probably within the scope of the flood control project at Franklin Falls in that it was determined that it would be taken for use in building the type of dam determined upon at the place selected, it was 'within the scope of the project from the time the Government was committed to it'." (R. 239). This holding seems to have been the basis for the decision. The case was thought to be controlled by *United States v. Miller*, 317 U. S. 369, in which this Court said, —

> "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probbly would be condemned."

In the Miller case the lands involved were held to be within the scope of the project from the beginning. The land was taken to provide a right of way for the tracks of the Central Pacific Railroad, the relocation of which was necessary

because of the flooding of the old right of way by the reclamation project. The completed project included this right of way as well as the reservoir. The public improvement, when completed, extended to and included the defendant's land. In the opinion the words "project" and "public project" are used interchangeably with "improvement" and "public improvement".

There are essential differences between the Miller case and the present case. This flood control project was authorized by the amendment to the Flood Control Act enacted June 28, 1938. (52 Statutes 1215-16). This act incorporated by reference the report of the Chief of Engineers of the War Department, in which was described the project, Franklin Falls Reservoir.* In this report the Franklin Falls Reservoir is described as consisting of an earth dam with a pool area of 2,950 acres. The reservoir as described does not include the Rayno land, and there is no evidence that the land was then considered essential to the project. Following the Flood Control Act of 1936, a geological reconnaissance was made for the purpose of determining whether material suitable for the core and blankets could be found within five miles of the dam. (R. 84). Three different deposits were located (R. 78, 79), but not until the specifications for the construction of the dam were issued in the summer of 1939 was the Rayno land designated as the source of the borrow. (R. 71, 72). The evidence is clear that the Rayno land was not originally within the scope of the project. Furthermore, the Rayno land never has been within the scope of the project. The land was condemned for the material and not as a site for the project. The petition for condemnation was brought pursuant to 33

* "Drainage area: 1,000 square miles, Pemigewasset River.
Capacity: 170,000 acre-feet; 3.2 inches run-off.
Pool-full elevation: 395 feet mean sea level.
Pool area: 2,950 acres.
Dam: Earth; over-all length, 1,740 feet; maximum height, 140 feet; length of spillway, 450 feet (ogee control); bedrock is available for the outlet structures, the spillway section and the spillway channel. The spillway consists of a channel cut in earth and rock with a gravity-type ogee control section located on the west bank of the stream. The outlets consist of two horseshoe-shaped outlet conduits each 22 feet 6 inches high and 20 feet wide extending through the dam and are controlled by four 10- by 18-foot and two 6- by 10-foot vertical gates located in a control tower at the entrance to the conduits. The conduit area is 752 square feet and the gate area 840 square feet. The dam is of rolled-earth fill with dumped rock shell and toe, 35 feet wide at the top (elevation 419 feet mean sea level) and with side slopes varying from 1 on 2½ to 1 on 3½.
Land involved: 3,360 acres.
Towns affected: Franklin, Hill, Bristol, Sanbornton, and New Hampton.
Railroads affected: None.
Highways affected: 7½ miles." Table 39, Franklin Falls Reservoir, Report Chief of Engineers, House Doc. 689, P. 62.

U. S. Code, section 591, which authorizes the Secretary of War to "cause proceedings to be instituted in the name of the United States * * * for the acquisition by condemnation of any land, right of way, or material needed, to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law." The petition recites "that the land is needed in connection with" but not for the project. (R. 3). The land was not needed as a right of way or for the "works" but only for material to construct the works. Without the authority to condemn " material" the land could not have been acquired by eminent domain. The material could have been acquired either by purchase or condemnation without taking the entire tract of land. The land has never been and is not now a part of this public improvement.

The land involved in this proceeding was regarded not only as within the project from the beginning but also as benefited by the project. The Court of Appeals declared, — "Now, obviously, the construction of the dam at Franklin Falls created a market for the hardpan on the property condemned and thus gave that land value as a gravel pit, but the question remains whether the value thus created is one the jury were entitled to consider." (R. 237). But, it does not follow that any enhancement in value due to an increased demand for borrow is a benefit for which the condemnor is entitled to credit. "On the other hand if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken." *United States v. Miller*, 317 U. S. 369. To be offset against damages, the increment in value must be the result of some benefit derived from the public improvement. *United States v. Alcorn*, 80 F. (2d) 487.

This flood control project did not benefit Rayno's land. His land is located high above the flood control project and three and one-half miles therefrom. (R. 68). This land derived no protection from floods or other advantage from the project. Where there are legal benefits, the costs of the public improvements may be assessed against the lands benefited. *Granite State Land Co. v. Hampton*, 76 N. H. 1. To assess Rayno's land for alleged benefits derived from this project would be a manifest absurdity. The enhancement in value results from the operations of the law of supply and demand. The increased demand for borrow broadened the market as did the

increased demand for cement, steel and other material entering into the construction of the project. The consumption of electricity was increased during the construction of the project but this was scarcely a benefit which could be set off had land of the electric utility been taken for the project. Brick, granite and limestone are frequently required for the construction of public improvements, but if a brick yard or quarry were condemned to provide such materials, the enhanced value resulting from the increased demand for such material could not legally be set off against the damages.

Whether the land involved in this proceeding was within or without the project, Rayno is legally entitled to recover its fair market value. "The market value * * * at the time it was taken measures the owner's compensation." *Vogelstein & Co. v. United States*, 262 U. S. 337. On Sept. 28, 1939 when the petition for condemnation was filed the project was under construction. The geological reconnaissance commenced in 1936 and continued into 1938, including tests by drilling on petitioner's land had given notice of the potential demand for borrow. (R. 77-9-80). The specifications for the construction of the dam released in 1939 disclosed that the borrow was to be taken from the petitioner's land. (R. 71-2). The market value of Rayno's land was affected by this development as would have been any borrow pit under similar circumstances. In the summer of 1939, the United States was a potential purchaser as were also contractors interested in the construction of the project. Had Rayno offered his farm for sale, the price would undoubtedly have been determined in some degree by the potential demand for borrow. The fact that this borrow was to be used by the condemnor should not deprive Rayno of its fair market value. In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the Court said, —

> "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purposes, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purpose."

And so *In Re Water Supply of City of New York*, 143 N. Y. S. 142, the owner was held entitled to the fair market value of a sand deposit on land taken for a reservoir. The Court, said, —

> "It is clear that, if a sand bank had been located immediately outside of the reservoir, the location of the reservoir would have added materially to the value of that bank, if there was not a surplus of sand in the locality. A purchaser desiring such property would necessarily have to pay a value enhanced by the fact that there was soon to be a market for sand in the locality and that it was the only available supup. The same rule would apply where the sand is located upon property to be condemned."

See also, *Olson v. United States* 292 U. S. 285.
New York v. Sage, 239 U. S. 57;
Medina Valley Irrigation Co. v. Seekatz, 237 Fed. Rep. 805;
Emmons v. Company, 83 N. H. 184;
Moulton v. Newburyport Water Co., 137 Mass. 163.

The relation of the Rayno land to the project is not different from that of a pit or deposit to a public highway constructed or reconstructed in whole or in part with borrow from the deposit. In such case, the demand for borrow would not be considered a legal benefit which could be offset against the damages occasioned by condemning the borrow pit or deposit. In fact, borrow pits or deposits commonly derive their value from proximity to public or private works or improvements, but this has not been thought to prevent the owner from demanding and receiving the fair value of the borrow. The increased demand for borrow is in no sense a special benefit occasioned by the public improvement.

In the present case, the instructions to the jury were adequate. Among other things, the jury was instructed that fair and just compensation must be determined by the loss to Rayno and not the benefit to the United States. (R. 223). This rule was observed throughout the trial. No attempt was made to show the value of the flood control project or what

it would have cost the War Department to construct the core and blankets from other materials such as cement concrete. The evidence was directed exclusively to the fair market value of the glacial till on the Rayno land. This evidence as to the market value of borrow was confirmed by the government's witnesses. (R. 171, 202). Yet, because the demand for this borrow resulted from the construction of the dam the government contends that it is entitled to condemn the land without any consideration of the fair market value of the borrow. The law does not compel such injustice. Rayno is entitled to the fair market value of his land for the "highest and most profitable use" at the time of taking. *Olson v. United States*, 292 U. S. 246.

In this respect the decision appears to be in conflict with the *Olson* case and with *United States v. Chandler-Dunbar Company, supra.* In holding that the availability of the land for the special uses for which condemned may not be considered, the decision appears to be in conflict with *Ford Hydro-Electric Company v. Neeley*, 13 Fed. (2d) 361 and *Medina Valley Irr. Company v. Seekatz*, 237 Fed. 805. The result is predicated upon the erroneous assumption that the demand for borrow which gave "that land value as a gravel pit" was a benefit special or general resulting from the flood control project. See, *United States v. Alcorn*, 80 Fed. (2d) 487. The interpretation placed upon *United States v. Miller*, 317 U. S. 369 appears to be an unwarranted extension of the rule applied in that case. The questions are of general interest because of the large number of condemnation cases now pending. We respectfully submit that the issues are of such importance as to warrant a review of the decision in this case.

Respectfully submitted,

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